UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

BETTY HAMAL and JOHN HAMAL,	)	
	)	
Plaintiffs,	)	Case No. 16 CV 10159
	)	
v.	)	Judge Johnson Coleman
	)	
SETERUS, INC.,	)	Jury Trial Demanded
	)	
Defendant.	)	

PLAINTIFFS' RESPONSE TO
DEFENDANT'S MOTION TO DISMISS COMPLAINT

Plaintiffs Betty Hamal and John Hamal, by and through their undersigned attorneys, and for their response to Defendant's Motion to Dismiss Plaintiffs' Complaint, state as follows:

Introduction

The Hamals filed their Complaint on October 28, 2016, alleging various violations of the Fair Debt Collection Practices Act (FDCPA) and a violation of the Fair Credit Reporting Act (FCRA). The claims arise from a 2010 loan made from Bank of America ("BoA") to the Hamals for consumer purposes, which loan was secured by a Mortgage on property located at 4111 West Lake Street, Glenview, Illinois (the "Property"). On or around September 30, 2014, BoA transferred the servicing rights to the subject loan to defendant Seterus. At the time the servicing rights were transferred, the Hamal's account was considered delinquent because of a miscommunication and error on the part of BoA. Once Defendant began servicing the loan its representatives began contacting the Hamals frequently, informing them that they were in default and demanding that they cure the default. The accounting error was eventually resolved by BoA but the phone calls and letters from Defendant continued, even after BoA sent correspondence to Defendant stating that the Hamals were not in default.

The Hamals allege violations of the FDCPA for Defendant's repeated efforts to collect a debt which it knew was not actually in default and for contacting the Hamals directly even after being informed they were represented by counsel. Additionally, the Hamals allege Defendant violated the FCRA by falsely reporting to credit agencies that the Hamals' account was in default. Defendant filed a motion to dismiss the Hamals' Complaint, arguing that the subject loan was not a consumer debt and therefore the Hamals cannot allege a valid cause of action under the FDCPA, and that the Hamals' claim under the FCRA fails because they did not file a notice of dispute to the credit reporting agencies. Defendant's motion to dismiss should be denied because the nature of the debt is a factual issue that should not be determined at this stage of the litigation. The Hamals have complied with the Federal pleading standard and the specific nature of the debt should be explored in discovery. Defendant's too-narrow interpretation of what constitutes sufficient pleading must be rejected, as should its alarming request for sanctions against the Hamals for its Complaint. The Hamals have sufficiently pled actions under the FDCPA and FCRA to survive a motion to dismiss, but, if this Court finds that the Complaint is insufficiently pled, the Hamals pray that they be given leave to amend their Complaint.

Legal Standard

To survive a motion to dismiss brought pursuant to Rule 12(b)(6), "a complaint must contain sufficient factual material, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009)(quoting *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 570 (2007). "Federal Rule of Civil Procedure 8(a)(2) requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief.' Specific facts are not necessary; the statement need only 'give the defendant fair notice of what the ... claim is and the grounds upon which it rests.'" *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) *citing Bell Atlantic Corp.*, 550 U.S. at 555. For the purposes of a motion to dismiss, a court must accept as true the allegations of the complaint, construe all the allegations in the light most favorable to plaintiff, and draw all reasonable inferences in plaintiff's favor. *Chubb Indem. Ins. Co. v. 21 E. Cedar, LLC*, No. 10 CV 7111, 2013 WL 5663496, at *1 (N.D. Ill. Oct. 17, 2013) (Dow, J.). "Unless it is *certain* from the face of the complaint that any amendment would be futile or otherwise unwarranted, the district court should grant leave to amend after granting a motion to dismiss." *Runnion ex rel. Runnion v. Girl Scouts of Greater Chicago & Nw. Indiana*, 786 F.3d 510, 519–20 (7th Cir. 2015) (emphasis added by Court in *Runnion*) *citing Barry Aviation Inc. v. Land O'Lakes Municipal Airport Comm'n,* 377 F.3d 682, 687 (7th Cir. 2004).

Argument

I. THE HAMALS STATE VIOLATIONS OF THE FDCPA §§ 1692c(a)(2) and 1692e(2)(A)

Under the FDCPA, a consumer is defined as a natural person obligated or allegedly obligated to pay any debt. 15 U.S.C. § 1692(a)(3). In their Complaint, the Hamals allege they are "consumers" under 15 U.S.C. § 1692(a)(5) because the subject loan was made for personal, family, and household purposes. This statement is sufficient under the pleading standard set forth in the Federal Rules of Civil Procedure, Rule 8(a)(2), to put Defendant on notice as to the basis of the Hamals' claim. If Defendant disputes that allegation, that is an issue of fact to be explored in discovery and eventually determined by a trier of fact. Instead, Defendant seeks to bypass that procedure and argues that the subject debt is not consumer related due to the nature and terms of the Mortgage which secures the debt. However, this issue is not so easily resolved.

Defendant argues that the subject debt is commercial because the mortgage which secures it is not on the Hamals' primary residence. But, Defendant cites to no provision of the FDCPA which limits consumer debt to only mortgages held on primary residences. Nor does Defendant cite to any binding authority for its conclusion that the mere existence of an Assignment of Rents attached to a Mortgage is conclusive evidence that the underlying debt was commercial rather than consumer. Indeed, this very issue was contemplated in *Typpi v. PNC Bank, Nat'l Ass'n*, No. 13 CV 3930, 2014 WL 296035 (N.D. Ill. Jan. 27, 2014) (Bucklo, J), where plaintiff alleged that the subject debt was consumer related and defendants moved to dismiss the complaint on the basis that the debt was commercial because it was for a rental property and not plaintiff's primary residence. Like in the instant case, defendants in *Typpi* pointed to the assignment of rents as proof that the mortgage was for rental property and therefore commercial while plaintiff argued that he did not intend to rent the property at the time he entered into the loan. *Id.* at *3. The Court denied the motion to dismiss, finding:

> Here, while Plaintiff has not alleged that he actually lived in the house right after signing the mortgage documents, he has alleged that the debt was to purchase property for his personal use, and the documents Defendants point to are not conclusive proof that Plaintiff planned to rent the property from the outset. Moreover, a full investigation of [sic] nature of the debt requires further development of the factual record. For now, however, his allegations are sufficient to determine that the debt was consumer in nature.

Id. at *4. Similarly, in the instant case, the fact that an Assignment of Rents was part of the Mortgage is not conclusive proof that the loan was commercial rather than consumer. Should this Court find that greater factual detail as to the nature of the debt is required, the Hamals should be given leave to amend their Complaint.

Defendant's reliance on case law from other jurisdictions to support its position that the nature of the debt is conclusively evidenced by the terms of the Mortgage is unconvincing, especially because the cases demonstrate that courts routinely analyze the true nature of the debt beyond what is merely pled. However, in the cases cited, the plaintiff either does not attempt to argue or is unable to convincingly argue that the subject debt was consumer rather than commercial. *See Klahn v. Clackamas County Bank*, No. 3:13-CV-621-ST, 2013 WL 3834709, at *4 (D. Or. July 24, 2013) (court focused on the status of the subject property at the time of collection, and not at the time the loan was made); *Alexander v. SunTrust Mortgage*, No. 8:14-CIV-1552-T-EAK, 2015 WL 981642, at *4 (M.D. Fla. Mar. 5, 2015) (court found there was no reason to allow amendment of the complaint because defendants were not debt collectors under the FDCPA); *Fleet National Bank v. Baker*, 263 F. Supp. 2d 150, 154 (D. Mass. 2003) (court looked to prior court filings where both parties had consistently characterized the debt as commercial); *Edwards v. Ocwen Loan Servicing*, 24 F. Supp. 3d 21, 27 (D.D.C. 2014) (plaintiff failed to provide facts outlining her intent to use the property even in her brief in opposition to the motion to dismiss); *Kitamura v. AOAO of Lihue Townhouse*, No. CIV. 12-00353 LEK, 2013 WL 1398058, at *5 (D. Haw. Mar. 29, 2013) (subject loan was used to acquire rental property); and *Gonsalves-Carvalhal v. Aurora Bank, FSB*, No. 1:14-CV-151-SCJ-LTW, 2016 WL 5339695, at *5 (N.D. Ga. July 1, 2016) (plaintiff failed to plead sufficient facts in his second amended complaint).

The Hamals have a good faith basis for alleging the subject debt is consumer in nature. The subject property, 4111 West Lake Street, Glenview, Illinois, is adjacent to their primary residence, located at 4115 West Lake Street, Glenview, Illinois (hereinafter, the “Residence”). The Hamals purchased a tract of land prior to 2001, and in January, 2001, they divided the land into two lots, the subject Property and the Residence. The Hamals built their home on one of the lots, and intended for the subject Property to be used by their adult son as his primary residence. Indeed, their son moved in and lived on the subject Property for a period of time. The subject loan was made in 2010 and the money was for the Hamals' personal use, and the Hamals gave the Property as collateral for the loan. The Hamals were asked to sign an Assignment of Rents, and signed it because the subject Property was not their primary residence. Nevertheless, the loan was for personal, and not commercial, purposes, and was secured by a Property intended to be used by the Hamals' family member. For these reasons, the Hamals can and do state a claim for relief under the FDCPA. The Hamals believe the Complaint sufficiently alleges the subject loan was consumer in nature and falls within the scope of the FDCPA, however, if this Court finds the initial Complaint was not pled with sufficient facts, the appropriate result would be to grant the Hamals leave to amend their Complaint.

II. THE FCRA CLAIM WAS PROPERLY ALLEGED AGAINST DEFENDANT

The Hamals allege a violation of the FCRA based on Defendant knowingly providing false information to a credit agency, specifically, that the Hamals' loan was in default. Defendant argues that there is no private right of action under Section 1681s2(a)(1)(A), citing *Purcell v. Bank of Am.*, 659 F.3d 622 (7th Cir. 2011). While the Seventh Circuit authority suggests there is no private right of action, the Hamals have sufficiently alleged that a violation of the Act occurred and it is premature at this juncture to determine whether the Hamals are entitled to relief. In addition, Defendant's discussion of Section 1681s-2(b) is irrelevant as it was not alleged in the Complaint. Moreover, Defendant's argument is disingenuous in light of the fact that its representatives repeatedly told the Hamals, when they disputed any default, that they should go ahead and pay the disputed amount so that Defendant would stop reporting them as delinquent to credit agencies. Because the Hamals sufficiently allege a violation of the FCRA, this claim should survive Defendant's motion to dismiss.

III. THERE IS NO BASIS FOR SANCTIONS AGAINST PLAINTIFFS.

Defendant argues it is entitled to an award of attorney's fees and costs based on the Hamals' filing of their Complaint, citing to Section 1692k(a)(3) of the FDCPA. As clearly demonstrated here, the Hamals' claims were in no way brought in bad faith and were sufficiently pled to state a plausible claim. Indeed, Defendant has not established a sufficient basis for dismissal of the Complaint, much less for any award of sanctions. Defendant has certainly provided no justification for its assertion that the Complaint was brought in bad faith or for purpose of harassment. The Hamals properly alleged the loan made from BoA was for personal, family, or household purposes and thus the subject debt falls within the scope of the FDCPA. Likewise, the Hamals sufficiently alleged a violation of the FCRA for Defendant's reporting of false information to credit agencies. The Hamals have demonstrated that their claims are plausible and that Defendant's motion to dismiss is not well-founded. In the event this Court were to find the Complaint lacks certain facts, the appropriate remedy is to permit the Hamals to amend their Complaint. Dismissal of the Complaint in these circumstances is unwarranted, and Defendant's demand for sanctions at this stage in the litigation is completely baseless.

Conclusion

Defendant argues too narrow a reading of the FDCPA and what constitutes a consumer debt. The subject Property was intended for family purposes and the loan secured by the Property was used for personal reasons. While these specific facts were not pled in the initial Complaint, the Hamals alleged in good faith that the loan made to them was for personal, family, or household purposes and falls within the scope of the FDCPA. Their Complaint states a cause of action for violations of the FDCPA and should not be dismissed. Likewise, the Hamals allege a violation of the FCRA and it is premature to dismiss their claim based on the relief to which they are entitled.

Finally, in light of their good faith in pleading, there is no basis for awarding sanctions against the Hamals. Defendant seeks too harsh an outcome as dismissal of the Complaint is not warranted. If the Complaint is deficient in any way, the appropriate result would be to allow the Hamals to amend their Complaint.

WHEREFORE, for the foregoing reasons, Plaintiffs Betty Hamal and John Hamal respectfully request this Court deny Defendant's Motion to Dismiss Plaintiffs' Complaint, or, in the alternative, grant the Hamals leave to file an amended complaint, and for such further relief as this Court deems just and equitable.

Dated: February 17, 2017

Respectfully submitted,
BETTY HAMAL and JOHN HAMAL,

By: s/ *Eileen E. Rosen*
One of their Attorneys

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CERTIFICATE OF SERVICE

The undersigned attorney certifies that on February 17, 2017, she caused the service of **Plaintiff's Response to Defendant's Motion to Dismiss Complaint** to be served on all parties via this court's ECF system.

s/ *Eileen E. Rosen*